

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO.57 OF 2020**

SINO LOGISTICS CO.LTD.....PLAINTIFF

VERSUS

FRECO EQUIPMENT.....DEFENDANT

RULING

Last Order: 17/09/2021
Date of Ruling: 23/09/21

NANGELA, J.:

This ruling comes as a result of a Notice of Preliminary Objection which the Defendant filed in Court on the 5th day of August 2021. In that Notice, two grounds were raised against this suit, notably, that:

1. The List of additional documents, Notice to rely on secondary evidence and certificate of authenticity filed by the Plaintiff on 12th of July 2021, are incurably defective for want of attachment thereon.
2. The Plaintiff's sole witness statement is incurably defective

for contravening mandatory provisions of rule 50(1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012, GN No.250 of 2012 (as amended) by the High Court (Commercial Division) Procedure (Amendment) Rules, 2019, GN No.107.

On 16th day of August 2021, the learned counsels for the parties appeared before this Court for necessary orders. Mr Dismas Rafael, learned advocate appeared for the Plaintiff while Mr Yohana Ayall, appeared for the Defendant. On the material date, this Court was informed of the Notice of Preliminary objection and the need to address it before hearing of this suit commences. I gave direction that the matter be dealt with by way of written submissions and gave out a filing schedule which the parties have duly adhered to.

In his submission, the Defendant's counsel urged this Court to struck out the list of additional documents, Notice to rely on secondary evidence and certificate of authenticity filed by the Plaintiff on 12th of July 2021 as well as the Witness Statement as well filed in Court by the Plaintiff, and consequently, dismiss the suit with costs for want of prosecution.

Submitting on the first ground, Mr Ayall contended that, having been served with the "*List of additional*

documents, Notice to rely on secondary evidence and certificate of authenticity' no documents purporting to be part of the list was attached to it. Mr Ayall submitted that, as a matter of professional courtesy, personal efforts were made to call on the counsel for the Plaintiff, including sending a *WhatsApp text* to him, but with no response.

He submitted that, upon perusal in the Court record to check if the filed documents in Court had the requisite attachments, so as to prepare for cross-examination, he also found that the same were not in the Court file as well. He submitted, therefore, that, the list of document only listed intended documents without attaching them to the list and that, the Notice to rely on secondary evidence and certificate/ affidavit, mentioned the intended documents but all were not accompanied with the same.

In his submission, Mr Ayall contended that, the documents not attached to the list filed in Court or the Certificate of authenticity, as well as the Notice to produce, were the reason why leave of this Court was sought and granted to have them filed. As such, he submitted that, laxity to comply with the Court's order cannot be condoned at the benefit of the defaulting party and at the detriment of the innocent party, the defendant who missed a chance to prepare for cross-examination on the disputed evidence.

Mr Ayall has contended that, the additional documents for which a notice to produce was filed are NBC's cheques and the Notice was filed in Court under section 68 of the Evidence Act, Cap.6 R.E.2019. He contended, however, that, the notice contravenes section 67 of the Evidence Act. He submitted that, section 67(1)(a) (iii) of the Act, Cap.6 R.E 2019 is to the effect that, where a party wishes to invoke section 68 of the Act, he should first comply with section 67 which calls for Notice on the other party bound to produce the said document.

He argued that, the notice should have been sent to the NBC in whose possession the documents are and not the Defendant. Further that, the Plaintiff did not even attach copies of such documents. Since the documents were not attached, Mr Ayall submitted that, the same were never pleaded and so, do not form part of the record of the court as they ought to be expunged. He relied on the Court of appeal decision in **Eusto K Ntagalinda vs. Fish Processors Ltd, Civil Appeal No.2 of 2012 (unreported)**.

As regard the second ground of his objection, it was Mr Ayall's submission that, the sole "Witness Statement" filed in Court contravenes Rule 50 (1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012, GN No.250 of 2012 (as amended) by the High Court

(Commercial Division) Procedure (Amendment) Rules, 2019, GN No.107.

Mr Ayall contended that, it does not efficiently identify any document to which the statement refers without repeating its content unless this is necessary to identify the document. Further, he submitted that, while it refers to two affidavits, non is attached to the statement and includes electronic documents never authenticated as required under section 18 of the Electronic Transactions Act, (ETA), 2015.

He argued further, that, the Statement refer to 'secondary evidence' without identifying efficiently which secondary evidence are being referred to and makes reference to documents never pleaded which are inadmissible for failure of being attached to the plaint and in the list of additional documents. He contended that the witness statement is made incompetent. He referred the Court to paragraph 3.2 and 3.3 of the 3rd Schedule, arguing that, the Witness Statement contravenes the 3rd Schedule.

To support his submission, reliance was placed on the case of **Ivee Infusions EPZ Ltd vs. MAK Medics Ltd, Comm. Case No.3 of 2019, (unreported)** as well as the cases of **NIC Bank Tanzania Ltd vs. Hirji Abdallah Kapikulila, Misc. Commercial Appl. No.253 of 2017 (unreported), and AFRICARRIERS Ltd vs.**

Shirika la Usafiri Dar-es-Salaam Ltd and Equity Tanzania Ltd, Comm. Case No.50 of 2019 (unreported). He urged this Court to strike out the Witness Statement.

Mr Rafael, the learned counsel for the Plaintiff, has given a very brief reply to the preliminary objections. He contended that, all documents cited and referred to on the certificate of authenticity, list of additional documents and notice to produce (rely on secondary evidence are all attached in both the pleadings and the witness statement filed by the Plaintiff and in compliance with the Rules.

He also contended that the witness statement is in compliance with the Rules of this Court and that; the Defendant will have a room to dispute any document during the hearing. In his view, the rules are for the sole purpose of smooth administration of justice and any omission thereto can be saved by invoking the overriding objective principle. He contended, therefore, that, the preliminary objections should be dismissed with costs.

On the 07th day of September 2021, the learned counsel for the Defendant filed a rejoinder submission. It was Mr Ayall's rejoinder that, the learned counsel for the Plaintiff was on the erring path because the additional documents were being filed as an addition to document already filed in the Plaintiff and, that, were not initially part of the pleadings.

He also reiterated his submission that failure to attach the copies of electronic data message in respect of which the Plaintiff sought for an order to file certificate of authenticity, renders the certificate incompetent, and the same applies to the Notice to Produce. The rest of his rejoinder is mere repetition which I need not reproduce here.

Having considered the rival submissions narrated here above, the issue I am confronted with is whether the preliminary objections are with any merit. Before I respond to that, I think one need to ask as to whether it was, in the first place, appropriate to bring them at this time or raise them as matters that could have been raised in the course of the trial.

The case of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited** [1969] 1 EA 969, the defunct Court of Appeal for Eastern Africa set out what a preliminary objection is and what it should contain.

Justice Law had this to say (at page 700 of the Court's decision) concerning a preliminary objection:

"In so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary

point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Besides, at page 701, Sir Newbold observed as well, and abhorred the unnecessary objections which could have been dealt with in the normal way in the suit. The Learned Judge observed that there is an:

“... increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A Preliminary Objection is in the nature of a demurrer. **It is a pure point of law** which is argued on the assumption that all facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained** or if **what is sought is the exercise of judicial discretion.** The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues. **This**

improper practice should stop.” (Emphasis added).

From the above quotation, a preliminary objection has to be **a pure point of law** and is argued on assumption that all facts are correct. It is not a preliminary objection if there is need for evidence to ascertain a fact or on a matter for which the Court’s discretion may be exercised. This is what this Court will bear in mind as it considers the various points raised by the Defendant herein and the responses thereto.

It is also worth noting that, in the case of **Karata Ernest & Others vs. Attorney General, Civil Revision No.10 of 2010 (CAT) (unreported)**, the Court of Appeal further stated that:

"Where a point taken in objection is premised on issues of mixed facts and law, that point does not deserve consideration at all as a preliminary objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings."

In this present suit, the Defendant filed as preliminary objections two points which I enlisted earlier on here above. Mr Ayall, for the Defendant, has laboured to submit at length on those points. In my view, these are matters which could have been raised in the course of the

hearing and should not have come as preliminary objections.

I hold that view because; the Defendant's learned counsel, seems to have hijacked the process of tendering and admissibility of documents, which is a process which goes side-by-side with the trial of the suit. I am of the view, therefore, that, he should not have disputed the documents intended to be relied upon, including the list of document filed by the Plaintiff by way of a preliminary objection as he has done, while he will have an opportunity in Court at the hearing and tendering of the documents.

Besides, whether the attachments were indeed attached to the list and the Notice or not, that is not a matter of law but of fact to be ascertained by evidence and, for that, reason, cannot be subject of a preliminary objection. Furthermore, whether the Witness Statement is compliant to the requirements of the law or not and whether any non-compliance is rescued by the overriding objective principle or not, that cannot, as well, be a subject of preliminary objection as it calls for scrutiny and thus, falls outside the standards set by **Mukisa Biscuits' case** (supra) as reiterated in the **Karata Ernest's case** (supra).

To say the least, the preliminary objections are matters which ought to be dealt with in the normal way in

the course of the proceedings. Perhaps it is imperative that the learned counsel for Defendant herein and indeed, the members of the Bar in general, to take heed of what the defunct Court of Appeal for Eastern Africa observed (Sir Newbold, P) at page 701 of his judgment in the **Mukisa Biscuits' case (supra)**.

For the reasons above, since I have made a finding that the preliminary objections fall short of the standards set by the **Mukisa Biscuits' case (supra)** and the **Karata Ernest's case (supra)**, it follows that, I will not determine their merit by proceed to hereby dismiss them with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 23RD SEPT. 2021



A handwritten signature in blue ink, appearing to read 'Deo John Nangela', written over a horizontal dotted line.

DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)